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REGULATION AND PUBLIC LAW IN
COMPARATIVE PERSPECTIVE

Administrative law is a key determinant of legitimate executive-branch policy making. Democracies cannot realistically limit policy making to the legislature. Delegation under broad, framework statutes is essential for effective government, but it does not eliminate the need for democratic responsiveness. Those interested in strengthening democracy should not be content with the patterns of delegation, consultation, and oversight that arise from the self-interested behaviour of politicians. This essay summarizes a number of different models, but whatever route they choose, emerging democracies need to assure rights to participate beyond a predetermined group of stakeholders and to make these rights legally enforceable. Reformers in the emerging economies that have been a focus of Michael Trebilcock's work need to seek democratic legitimacy, not just in electoral systems, but also in public administration.

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I Introduction

Michael Trebilcock is a pioneer in applying law and economics insights to the study of developing and emerging economies. In a series of articles and in a recent book with Ronald Daniels, he seeks to balance the value of private enterprise in spurring development against the risks that it will undermine the public interest if given too free a rein. Unless controlled through contractual terms or regulatory and tax policy, for-profit firms will not, on their own, consider distributive justice, poverty alleviation, or ecology and public health.¹ Furthermore, Professor Trebilcock's work balances the preservation of a society's traditional ways of managing property and resolving disputes against the recognition that some traditions can be dysfunctional – promoting violence and revenge and undermining entrepreneurial incentives. Trebilcock acknowledges that existing practices, however culturally entrenched, can be deeply dysfunctional, so that reformers need to find ways to overcome these practices.² Of course, reform will be easier if it can be tied to

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1 Ronald J. Daniels & Michael J. Trebilcock, 'Private Provision of Public Infrastructure: An Organizational Analysis of the Next Privatization Frontier' (1996) 46 U.T.L.J. 375; Michael J. Trebilcock & Ronald J. Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Cheltenham, UK: Edward Elgar, 2008).

2 Michael J. Trebilcock, 'Communal Property Rights in Papua New Guinea' (1984) 34 U.T.L.J. 387; Michael J. Trebilcock, 'Comment' in M. Bruno & B. Pleskovic, eds.,

existing behaviour and presented as an incremental change,³ but limiting reform to such situations is likely to condemn some portions of the world to perpetual poverty and violence.

Law and development specialists commonly urge emerging economies to promote 'the rule of law.' In a recent paper Kevin Davis and Michael Trebilcock sought to unpack this talismanic phrase and to show that it stands for a wide range of not always consistent policies.⁴ To some, the rule of law implies nothing more than clear and market-friendly rules. To others, it means the protection of individual rights and legal accountability for past wrongs. I focus on yet a third aspect of the rule of law, which is, I hope, compatible with Michael's broad-gauged, interdisciplinary approach. I concentrate on the way public institutions can help structure private-sector behaviour in the public interest, and I focus, in particular, on the link between administrative law and public policy making.⁵ I hope to contribute to the ongoing debate in comparative law on convergence versus divergence in public law and to reflect on the implications of that debate for administrative law reform in emerging democracies, especially in Latin America and Eastern Europe.⁶ If all advanced public law systems are converging to a similar set of legal principles and practices, there may be few options for the rest of the world;

Annual World Bank Conference on Development Economics – 1996 (Washington, DC: World Bank, 1997) 229; Michael J. Trebilcock & Paul-Erik Veel, 'Property Rights and Development: The Contingent Case for Formalization' (2008) 30 U.Pa.J.Int'l L. 397.

3 Robert Cooter, 'The Rule of State Law and the Rule-of-Law State: Economic Analysis of the Legal Foundations of Development' in M. Bruno & B. Pleskovic, eds., *Annual World Bank Conference on Development Economics – 1996* (Washington, DC: World Bank, 1997) 191.

4 Kevin Davis & Michael Trebilcock, 'The Relationship between Law and Development: Optimists versus Skeptics' (2008) 56 Am.J.Comp.L. 895.

5 Both Trebilcock's work and my own are in a political economic tradition that stresses the importance of institutions, including legal institutions, in influencing the behaviour of politicians, bureaucrats, businesses, and citizens. It also examines the way that political actors work to create institutions that will further their own interests. For a collection of political economic readings in administrative law see Susan Rose-Ackerman, ed., *Economics of Administrative Law* (Cheltenham, UK: Edward Elgar, 2007). For a constitutional law and economics approach see Robert C. Cooter, *The Strategic Constitution* (Princeton, NJ: Princeton University Press, 2000).

My research in this area compares the public law system in Germany and those in Hungary and Poland with that in the United States. See Susan Rose-Ackerman, *Controlling Environmental Policy: The Limits of Public Law in Germany and the United States* (New Haven, CT: Yale University Press, 1995) [Rose-Ackerman, *Controlling Environmental Policy*]; Susan Rose-Ackerman, *From Elections to Democracy: Building Accountable Government in Hungary and Poland* (Cambridge: Cambridge University Press, 2005) [Rose-Ackerman, *From Elections to Democracy*].

6 See, e.g., Benedict Kingsbury, Nico Krisch, & Richard Stewart, 'The Emergence of Global Administrative Law' (2005) 68 Law & Contemp.Probs. 15.

emerging democracies must accept the growing consensus, modified only by their own lack of financial and human resources. In contrast, if alternative models exist, nation-states can pick and choose. Colonial heritage need not determine present-day reform, and the diversity of options will give locally based reformers a way to resist overly doctrinaire proposals both from insiders with a vested interest and from outsiders in the aid and lending community.

My approach differs from two excessively deterministic strands in comparative law and in law and development. The first sees a dynamic convergence of legal forms propelled by powerful global trends. The latter, in contrast, stresses the dead hand of the past, especially colonialism, and the unchangeable impact of geography and demography. Although each explains some aspects of the real world, each is incomplete. Instead, human agency interacts with history and circumstance to produce diverse legal patterns that do not seem to be converging. Countries are not inevitably caught in deterministic forces outside their control. There is room for normative analysis and prescription if legal reformers avoid simplistic cookie-cutter legal borrowing.

Law and development scholars debate the impact of colonial history and past legal borrowing on present-day development experience. Some claim that deep historical factors are the fundamental determinants of economic growth and other variables. If this is true, then one might conclude that countries cannot escape their history – some countries' pasts inexorably generate poor results. Some statistical work uses historical factors for identifying purposes because they are clearly independent of present-day institutions and thus solve the problem of simultaneous causation. Statistical work variously finds that settler mortality, colonial heritage, religion, and distance from the equator are good proxies for today's institutional structures.⁷

One difficulty with the convergence/difference debate is that the cross-country empirical work characterizes a country's legal system using a single measure of legal tradition. It does not attempt to distinguish between public and private law or between constitutional law, regulatory statutes, and private commercial law. To the extent that the content of law enters the analysis, the literature highlights commercial

7 Rafael La Porta, Florencio Lopez-de-Silanes, & Andrei Shleifer, 'The Economic Consequences of Legal Origins' (2008) 46 *J.Econ.Lit.* 285. Critiques or modifications of the legal origins literature are D. Acemoglu, S. Johnson, & J.A. Robinson, 'The Colonial Origins of Comparative Development: An Empirical Investigation' (2001) 91 *Am.Econ.Rev.* 1369; Daniel Berkowitz, Katharina Pistor, & Jean-François Richard, 'Economic Development, Legality and the Transplant Effect' (2003) 47 *Eur.Econ.Rev.* 165; Mark Roe, 'Legal Origins, Politics, and Modern Stock Markets' (2006) 120 *Harv.L.Rev.* 460.

law and private economic law. There do, indeed, seem to be differences in the way countries' legal systems interact with private businesses, but the oversimplified civil law/common law distinction suppresses the wide range of actual experience.⁸

Neither the convergence hypothesis nor a model based on historical or geographical determinism provides a persuasive unitary theory of law's impact. History, location, and legal origin are important, but many emerging democracies have experienced huge changes that cannot easily be tied to fixed country characteristics. Conversely, evidence for systemic convergence is weak. Some observers too glibly assume overall convergence from examples of mimicry along specific dimensions. Analysts pose the empirical question of whether legal systems are converging and the normative question of whether they ought to converge at too high a level of generality. To make progress, one needs to unpack 'the law' and distinguish between different substantive and procedural aspects.

Furthermore, the massive transformations that have occurred in Central Europe, the former Soviet Union, China, and Vietnam demonstrate that change is possible and can occur quite rapidly. The transitions to democracy in Latin America and Asia, however unfinished and rough-edged, demonstrate the same point. There is a tension in the literature on law and development between using transplanted legal systems as independent variables in statistical analysis and seeking to advise emerging democracies on law reform. If legal reform is able to overcome the legacy of history, then my less deterministic approach, which is compatible with Trebilcock's work, can provide a more nuanced approach. It aims to understand how government and private-sector institutions affect economic outcomes and state legitimacy, and it considers how changes in those institutions can further or retard democratic reform. It does not, however, assume that convergence to a single model is the inevitable result of a globalized world.

In what follows I concentrate on public accountability and administrative law in states with democratic constitutional structures, elections, and a representative legislature. Democracies cannot realistically limit policy making to the legislature; delegation under broad, framework statutes is essential for effective government, but it does not eliminate the need for democratic responsiveness. Given that conclusion, democracies, new and old, need to work toward public accountability – not just in the legislature but in other institutions as well.

8 For an overview of the range of experience consult World Bank, *Doing Business in 2010: Reforming through Difficult Times* (Washington, DC: World Bank, 2009), online: Doing Business – The World Bank Group <<http://www.doingbusiness.org>>.

II *Three types of public accountability*

Government accountability is an important aspect of popular sovereignty. It is a source of political legitimacy in three distinct senses. Call these *performance accountability*, *rights-based accountability*, and *policy-making accountability*.⁹

The first sense requires the state to carry out public programs competently, using expert professionals as needed and assuring a high level of efficiency and integrity in the public service. Under this conception, political actors set the goals, and bureaucrats ought to carry them out in a cost-effective way – using whatever specialized knowledge is needed.

The key word is ‘competence,’ which implies both the use of experts and the existence of hard-working, well-trained civil servants who do not take bribes, embezzle funds, or create conflicts of interest. Call this *performance accountability*. It requires both transparency – so that outsiders can see what public officials and their agents are doing – and a means of holding officials to account if they perform poorly or operate outside the law.

Second, *rights-based accountability* implies legal constraints that protect individuals against abuses of arbitrary power. It is not conditional on popular sovereignty; even a limited autocracy may protect the individual

9 Rose-Ackerman, *From Elections to Democracy*, supra note 5 at 5–6, distinguishes between performance accountability and policy-making accountability. Here I add a third sense of the term. See also Jerry Mashaw, ‘Accountability and Institutional Design: Some Thoughts on the Grammar of Governance’ in M.W. Dowdle, ed., *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge: Cambridge University Press, 2006) 115. Mashaw’s political and my policy-making accountability are closely related, as are his managerial and my performance categories. See also Mark Bovens, ‘Public Accountability’ in E. Ferlie, Laurence Lynn, & C. Pollitt, eds., *Oxford Handbook of Public Management* (Oxford: Oxford University Press, 2005) 182.

The term ‘accountability’ is used in other senses as well and is often difficult to translate appropriately. A general discussion of the concept is Carol Harlow, *Accountability in the European Union* (Oxford: Oxford University Press, 2002) at 6–24. Harlow points out that some use the term only in the retrospective or fiscal accounting sense. She, however, uses a broader meaning that is consistent with my approach. To her, ‘standard-setting is a vital element in the process of securing accountability,’ and she gives ‘accountability a prospective dimension.’ Jacques Ziller, ‘Political Accountability in France’ in H. Broekstee, L. Verhey, & I. Van den Driessche, eds., *Political Accountability in Europe: Which Way Forward?* (Groningen: Europa Law, 2008) 83 at 84–5, points out that accountability is often translated into French as *responsabilité* but that this term includes three concepts: political accountability (*responsabilité politique*), criminal liability (*responsabilité pénale*), and civil liability (*responsabilité civile*). To capture the broader implications of the English term, however, French sometimes uses the plural, *responsabilités*, or *reddition de comptes*, the official equivalent. Spanish uses an equivalent phrase, *rendición de cuentas*.

to some extent. These rights may be enforced through a written, constitutional list of rights or by applying judicial concepts of 'natural justice' or *principes généraux du droit*. In the United States, the Bill of Rights plays this role, as does the Charter of Rights and Freedoms in Canada. In Europe, over and above national constitutions, the European Convention on Human Rights (ECHR) is beginning to have real bite, especially in the United Kingdom, which lacks a written constitution. If one accepts the value of a particular set of rights, a government is legitimate only if citizens can monitor the enforcement of such rights and hold government officials to account if they violate rights or fail to enforce principles of natural justice.

Third, the policy-making process itself should be responsive to democratic values. There are two ways to achieve such accountability. One route is through laws passed by representative assemblies and through referenda. Here elections provide the link to public opinion. However, if the legislature passes laws without direct public input, elections may be an insufficient check.

My primary interest is in policy that is made outside the legislature. It occurs inside the government/executive or in independent agencies and private entities. Delegation of policy making is pervasive in modern democracies, and it needs to be exercised in a manner consistent with democratic values. I call this *policy-making accountability*, and my aim is to analyse it and argue for its central importance.

Performance and rights-based accountability are background constraints. If a state cannot effectively deliver services, policy-making accountability hardly matters. The same is true if a state routinely violates rights. Taking these conditions as given, policy-making accountability goes beyond issues of competence, honesty, and the protection of rights. Statutes are frequently vague, unclear, and inconsistent, and they often leave difficult policy issues to the implementation stage. Delegation frequently requires the exercise of substantive policy discretion by cabinet ministers, experts, and bureaucrats. Sometimes the executive makes policy on its own, without any statutory framework. In all cases, however, officials must use their power in a manner consistent with democratic values. Electoral accountability is not sufficient, even for political officials; it is too infrequent and too rough-grained.

Whatever the risks and the countervailing political pressures, legislatures worldwide believe that the benefits of delegation outweigh the costs, and some constitutions require a degree of devolution and delegation through federalism and through constitutionally mandated institutions, such as central banks and broadcasting commissions. Given the ubiquity of delegation, I ask whether administrative law can help assure the democratic character of policy making.

III *Policy-making accountability in administrative law*

Administrative law can provide a framework for the achievement of policy-making accountability. Although it is unlikely to be the first order of business in emerging democracies, administrative law reform must eventually be part of the process of democratic consolidation.¹⁰ Administrative law must move beyond review of the formal legality of state actions toward the study of rules and principles that can enhance political accountability and competent policy making. Protecting the rights of individuals and businesses against an overarching state is not enough; public law should also help to contain excess assertions of executive power and to monitor private or quasi-public entities that carry out public functions.¹¹ These constraints are likely to be especially important in countries emerging from a period of authoritarian rule during which executive power was unchecked.

The basic building blocks of my argument for a broad conception of administrative law are the inevitability of policy-making delegation in democracies; the need for delegated power to be politically accountable; a conception of accountability that requires openness to outside opinions and expertise; and the claim that courts, as well as other independent bodies, can play a constructive oversight role in assuring accountability.

First, delegation of policy making outside the legislature is inevitable. Generalist legislators have limited time, expertise, and staff resources. They cannot respond to the complexity and fluidity of the policy environment with statutes that cover all eventualities in detail. Rather, they set the policy framework that must be filled in by regulations, legal guidelines, and/or the accumulation of individual case law. Experts need to help make policy that involves scientific, engineering, and social scientific material. Regulatory issues that arise on an ongoing basis need a permanent body to resolve disputes and apply the law.

In addition to this practical necessity, legislators will often find it politically expedient to delegate policy-making authority. Even if a constitutional non-delegation doctrine exists, a strict application of this doctrine is not feasible, given the factors outlined above. Political expediency combines with the logic of policy making to produce delegation of authority. We come, then, to my first building block: most legislation

10 Rose-Ackerman, *From Elections to Democracy*, supra note 5.

11 Justice Stephen Breyer, quoting Benjamin Constant, refers to this as 'active liberty' or the people's right to 'an active and constant participation in collective power.' Stephen Breyer, *Active Liberty* (New York: Alfred A. Knopf, 2006) at 10.

will not resolve all key policy issues. Instead, the law will assign policy-making power to ministries, agencies, or other institutions.¹²

Second, as a result of such delegation, implementation is not merely a technical exercise in legal gap filling. As a consequence, democratic legitimacy requires accountability from those with delegated policy-making power. Of course, the legislature does provide oversight through its power to determine budgets, review spending, hold hearings, set up commissions of inquiry, and so on. Members of opposition parties can play an important role. But just as the legislature does not have the time, expertise, or foresight to write detailed statutes *ex ante*, so, too, it lacks the ability to provide comprehensive oversight *ex post*. Current political imperatives determine legislative oversight priorities. As a consequence, the legislature is likely to overlook a wide range of government activities. Administrative law should aim to establish policy-making accountability that does not depend on the shifting attentions of the legislature.

Third, policy-making accountability should aim to further the goals of transparency, competence, and accountability.¹³ The process should inform citizens and interest groups that a policy choice is imminent and should give them an opportunity to express their opinions. At the same time, expertise needs to be brought to bear, and policy makers need to mediate conflicts between experts in a transparent way. The views of the public and the experts may diverge, and the regulatory authority should consider the evidence and the strength and nature of public concerns before promulgating a rule. The authority should publish the final rule along with a justification that acknowledges the disputed nature of the choice.

Public law can help organize and manage consultation in a manner consistent with the competent provision of services and the effective regulation of the economy. Across nation-states, consultation and participation in rule making vary in their legal status and in the nature of public input. At one extreme, the law mandates such processes.¹⁴ At the other, public hearings represent an illegitimate effort to override the political will of the legislature.¹⁵ An intermediate case is one

12 On the reasons for delegation of policy-making authority from legislatures to the executive see, e.g., James Q. Wilson, *The Politics of Regulation* (New York: Basic Books, 1980); David Epstein & Sharyn O'Halloran, *Delegating Powers* (Cambridge: Cambridge University Press, 1999); Susan Rose-Ackerman, 'Introduction' in Susan Rose-Ackerman, ed., *Economics of Administrative Law* (Cheltenham, UK: Edward Elgar, 2007) xiii at xv–vii (reviewing the broader literature).

13 For a fuller discussion of the issues raised here see Rose-Ackerman, *From Elections to Democracy*, *supra* note 5 at 216–39.

14 *Administrative Procedures Act*, 5 U.S.C. § 553 [USAPA].

15 See, e.g., the classical German view of the *Rechtsstaat* under which the administration is subordinate to the law and the route for public involvement is through legislative elections based on party competition. Nevil Johnson, *State and Government in the*

where hearings are permitted but there is no legal recourse if they do not occur.¹⁶

The process of involving the public can range from notice and information requirements that cast outsiders in a watchdog role, through acceptance of public comments as part of the rule-making process, to negotiated consensual rules.¹⁷ The law may require government bodies not only to consult but also to explain the reasons for their choices.¹⁸ Consultation may be open-ended or with a closed list of stakeholders. If the law specifies the represented groups, the government may choose the individual participants, or the groups themselves may select them.¹⁹ The state may finance all participation or only subsidize the participation of less wealthy and well-organized groups. Conversely, it can simply make the process available to interested people or groups. These processes may be purely advisory or legally required and enforceable in the courts.

The strongest form of public participation is one in which a consensus of the stakeholders makes the policy choice. Only in a very narrow range of circumstances, however, will consensual processes be consistent with majoritarian democracy.²⁰ Furthermore, even in those cases, regulatory negotiation requires a prior technocratic exercise that frames the issue. Stakeholders should not negotiate about the facts. In the common case where consensus is not feasible, a public hearing is an alternative route that pushes government policy makers to take account of options that have strong public support and to explain their reasons for accepting or rejecting them. Hearings, however, may expose conflicts between government policy preferences and the wishes of outside interest groups and concerned citizens.

Federal Republic of Germany (Oxford: Pergamon, 1983). For a recent expression of this view see Thomas Henne, Book Review of *Environmental Policy in Germany and the United States: Controlling Environmental Policy* by Susan Rose-Ackerman, (2003) 51 Am.J.Comp.L. 207.

16 This is generally the case, for example, in Argentina, where a 2003 executive decree (Decree 1172/2003, 3 December 2003, A.D.L.A. 2004-A, 174) established a discretionary participatory process for administrative rule making.

17 Compare Francesca Bignami, 'Three Generations of Participation Rights Before the European Commission' (2001) 68 Law & Contemp.Probs. 64 (outlining the development of participation rights in the European Union from a focus on enforcement procedures against individuals or firms to the beginnings of participatory processes in the promulgation of general rules).

18 E.g., USAPA, *supra* note 14 at § 553(c). See Jerry Mashaw, 'Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance' (2007) 76 Geo.Wash.L.Rev. 99.

19 The use of stakeholder advisory committees is common in Europe. See, e.g., the cases of Germany, Hungary, and Poland discussed in Rose-Ackerman, *Controlling Environmental Policy*, *supra* note 5 at 63–6; Rose-Ackerman, *From Elections to Democracy*, *supra* note 5 at 131–7.

20 Susan Rose-Ackerman, 'Consensus versus Incentives: A Skeptical Look at Regulatory Negotiation' (1994) 43 Duke L.J. 1206.

Consultation with stakeholders is not sufficient. Agencies must also consult those with expertise in the specialized areas subject to regulation, but problems of public accountability can arise from the overuse of technocratic methods. Experts may conflict and may question not only others' results but also their status as experts. A sceptical public may be difficult to convince if complex policies depend on esoteric science and social science.

However, the difficulty goes deeper. Even if no one had any problem understanding the details of a cost-benefit analysis or risk assessment, it does not follow that all would agree with its policy implications. Some will bear the costs; others may want a distribution of benefits skewed toward the poor; still others may weigh aesthetic or cultural values more highly than the analyst. The mere use of analytic methods will seldom resolve controversial issues. Analysis, however competent, cannot eliminate deep disagreements over values.²¹ Expertise and public input may be in tension over desirable policy. Striking a balance must be a central concern for emerging democracies that wish to create accountable and competent governments.

Delegated policy-making procedures should not be identical to legislative processes. In my normative framework, administrative law furthers competent, accountable policy choices by requiring public authorities, which might otherwise act in an insular way, to consult and to justify their actions. Most legislatures face no such requirements. Laws are seldom struck down by courts because hearings were not held or justifications were inadequate.²² Only violations of the most basic formal requirements or inconsistency with constitutional rights can normally void a legislative action.²³

The fourth and final step in the process is independent review that checks the policy decision for conformity with the underlying substantive

21 See Matthew D. Adler & Eric A. Posner, *New Foundations of Cost-Benefit Analysis* (Cambridge, MA: Harvard University Press, 2006) for a recent attempt to modify CBA to take account of some of its purported difficulties. For a critique of that effort see Amy Sinden, Douglas A. Kysar, & David M. Driesen, 'Cost-Benefit Analysis: New Foundations on Shifting Sand' (2009) 3 *Regulation & Governance* 27. See also Jennifer Nou, 'Regulating the Rulemakers: A Proposal for Deliberative Cost-Benefit Analysis' (2008) 26 *Yale L. & Pol'y Rev.* 601.

22 For an exception see *Doctors for Life Int'l v. Speaker of the National Assembly*, [2006] 12 B. Const. L.R. 1399 (S. Afr. Const. Ct.) (upholding participation rights for legislation). The case is discussed in Karen Syma Czapanskiy & Rashida Manjoo, 'The Right of Public Participation in the Law-Making Process and the Role of [the] Legislature in the Promotion of This Right' (2008) 19 *Duke J.Comp. & Int'l L.* 1.

23 For example, the legislative veto provision of a US statute was found to be unconstitutional because the Supreme Court viewed it as law-making that did not satisfy the Constitution's bicameralism and presentment clauses: *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

statute and with the procedural constraints designed to ensure policy-making accountability. The policy-making agency makes the ultimate policy decision, but it must consult *ex ante* and justify its actions *ex post*, subject to limited external review. The review process will check to see that the policy maker has taken public input into account and made a well-reasoned, publicly justified decision.²⁴

This basic framework is normatively relevant for all kinds of constitutional structures – from those with strong directly elected presidents to pure Westminster parliamentary systems. The ability of representative political institutions to override exercises of delegated authority differs across systems; it is higher in parliamentary systems than in presidential ones. However, policy making outside the legislature is pervasive in all systems and cannot be sufficiently controlled by legislative oversight alone. In presidential systems, the chief executive may make policy that deviates from the aims of the original drafters of the statute or from the current policy coalition in the legislature. To prevent the former, the legislature can write detailed statutes; however, this practice will exacerbate the latter problem and will also limit the executive's ability to respond to changes in external conditions or in scientific understandings. In a parliamentary system, the same party coalition controls both the executive and the dominant house of the legislature. This means that the 'government' can readily amend statutes to conform to the aims of the current political coalition.²⁵ However, the professional civil service often has a central policy-making role in parliamentary systems, especially if the governing coalition changes frequently. Hence, procedural checks on its authority can further public accountability much as they do in a presidential system.²⁶

IV *Contrasting routes to policy-making accountability*

Given this basic framework, policy-making accountability can take many forms, which differ in their organizational structures, appointment processes, and decision-making procedures. Matching the options to the substantive problems is a key aspect of good institutional design. If emerging democracies look to the experience of more established polities, they will

24 See USAPA, *supra* note 14 at §§ 701–6 (setting out similar conditions for judicial review of administrative action, including rule making).

25 George Tsebelis, 'Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism' (1995) 25 *Brit.J.Pol.Sci.* 289.

26 However, the unitary government characteristic of a parliamentary system will have little incentive to enact procedural constraints. See Terry M. Moe & Michael Caldwell, 'The Institutional Foundations of Democratic Government: A Comparison of Presidential and Parliamentary Systems' (1994) 150 *J.Inst.& Theor.Econ.* 171; Rose-Ackerman, *Controlling Environmental Policy*, *supra* note 5 at 7–17.

find that states follow very different strategies as they balance public participation, expertise, politics, professional norms, and the rule of law. Out of this experience, I distil four stylized models to encapsulate the range of choice. Call them the political model, the expertise model, the partisan-balance model, and the privatized model. The *political model* builds in accountability by entrusting the ultimate decision to those with political affiliations. The *expertise model* delegates authority to neutral or expert decision makers. Under the *partisan-balance model*, a politically accountable appointment process leads, in the ideal, to neutral, impartial choices. The *privatization model* delegates policy making to a quasi-private body that is largely independent of the government.

A POLITICAL DECISION MAKERS

In the political model, the legislature – a political body – delegates policy-making authority to another politically responsible actor – be it the president, the prime minister, or an individual cabinet member. The civil service may help to frame issues, and legislation may require consultation with experts or the public, but decisions are in the hands of political actors. The route for redress is the ballot box or a lobbying campaign to amend the statute or replace the politically responsible officials. Judicial review is concerned only with whether the government has exceeded the power granted to it by statute – often called *ultra vires* review.

An extreme form of political delegation is the power of presidents or prime ministers to issue decrees with the force of law in the absence of explicit delegation by statute. These decrees have external effect on society; they are not just internal orders to the bureaucracy. The most salient present-day examples are the decree powers of some Latin American presidents and of the Russian president. In most cases, these powers are time limited and must eventually be submitted to the legislature. Even these more limited cases, however, give the executive a first-mover advantage.²⁷

B EXPERT DECISION MAKERS

Some issues are not politically contentious. The legislature may safely delegate them to experts inside a government department or in an independent body. For example, a statute might appropriate funds for basic scientific research and leave it to an expert agency to apportion the funds. In such cases, generalist courts have little role in reviewing decisions, although specialized, similarly expert tribunals might provide oversight.

27 John M. Carey & Matthew Soberg Shugart, eds., *Executive Decree Authority* (Cambridge: Cambridge University Press, 1998).

But many policies, although highly dependent on expertise, generate wide-ranging controversy. In these cases, even if experts have the authority to make the final decision, they often must engage in formal consultation. A common response is to set up a broad-based advisory body that government officials must consult but which has no legal right to decide. The ultimate choice is left to technical experts.

This model, of course, makes sense only when politicians and their constituents believe that they can identify experts who both have the relevant information and are motivated to act in the public interest as seen by the legislature. It assumes that there is no political debate over which experts to consult; the science may be difficult to understand, but all agree on the individuals who have the proper expertise. The problem is simply that the overall issue cannot be resolved by expertise alone, however technically competent.

To bring expertise in line with political interests, the implementing statute might specify the framework for expert choice. For example, a statute might require the use of cost–benefit analysis (CBA) to set priorities²⁸ and also mandate broad consultation. Experts in CBA would promulgate the final rule, but consultation would help them to obtain information on costs and benefits unavailable from published sources. They could also gather opinions, both expert and lay, on contested issues with no ‘right’ answers.

The pathological version of the expert-led model is regulatory capture. Experts might tilt their choices in favour of the regulated industry in the hope of subsequent employment or, in the extreme, as a response to outright bribes.²⁹ More subtle problems arise when the expert’s own knowledge is not sufficient to make an informed choice. In such a case, biased consultation, dominated by the regulated industry, could affect the good-faith decisions of experts. Experts obfuscate their reasoning and hide the uncertainties of science to avoid a straightforward recognition of their own knowledge.

C PARTISAN BALANCE

The partisan-balance model explicitly acknowledges the tension at the heart of modern regulatory policy – the conflict between political accountability and expertise. I consider three variants. Call them the *institutional-constraints model*, the *partisan-balancing model*, and the

28 Kenneth J. Arrow *et al.*, ‘Is There a Role for Benefit–Cost Analysis in Environmental Health and Safety Regulation?’ (1996) 272 *Science* 221.

29 George Stigler, ‘The Theory of Economic Regulation’ (1971) 2 *Bell J. Econ. & Management Sci.* 3.

impartial-generalist model. The first two are common in the United States; the third is familiar in the United Kingdom.

In the institutional-constraints model, one or more political bodies – the legislature, the president, the senate, the political parties – appoint the decision makers. Sometimes, as for US federal judges, the process requires the consent of two or more partisan bodies. In other cases, appointments require a supermajority, a method that incorporates minority party preferences.³⁰ Although political factors may dominate at the appointment stage, institutional constraints limit the political pressures on sitting officials, once appointed, and prevent narrow self-seeking for personal gain. These institutional factors may include long or life terms, fixed minimum salaries, earmarked sources of budgetary funds, overlapping terms for multi-member bodies, removal only ‘for cause,’ and restrictions on subsequent employment by the regulated industry. In its pure form, the body makes impartial choices even given a purely partisan or self-interested appointment process; the agency is impartial because its members have no interest in biased results. Of course, the flip side is the risk that the regulators will have an idiosyncratic, minority view of good policy that they impose on the polity with little hope of correction. The government loses influence.

The partisan-balancing model might also include institutional constraints – as in most US independent regulatory agencies. However, it has some distinct characteristics. Its basic form is a multi-member agency that decides policy issues by majority or supermajority vote. To contrast the two models, imagine a multi-member agency that is not insulated from short-term partisan influence. Partisan appointees represent their political supporters, and political actors can easily remove them. In a two-party state, for example, a five-member commission might be limited to three members from one party. The commission, operating by majority rule, could sideline those affiliated with the minority party, but that could undermine the perceived legitimacy of its rules and policies.

The impartial-generalist model relies on commissions of inquiry composed of people with reputations for probity and no personal stake in the issue. Thus, impartiality results from the political appointment of people who claim to be able to consider matters objectively. The danger is that they are also ignorant; policy recommendations may be neutral but ill informed. To counter this problem, regulated entities and other stakeholders may have a leading role in presenting material to the commission. On the model of a common law judge, experts and groups who

30 For example, in Hungary justices of the Constitutional Court, Ombudsmen, and the president of the Audit Office all must obtain the support of two-thirds of the Parliament. Rose-Ackerman, *From Elections to Democracy*, supra note 5 at 57–60.

have a narrow private interest in the outcome advise the commission but have no decision-making authority. A member of the cabinet may then vet the commission's recommendations before issuing them as binding rules or submitting them to the legislature for approval.

These models all raise difficult issues for judicial review of agency actions. Should courts view the agencies like lower courts that have resolved factual matters, so that review is only on legal issues? If so, should the degree of deference to agency choices depend upon the agency model in force? For example, if the agency operates under court-like constraints, should the judicial review be more deferential than if the agency's operation is more closely tied to politics?

D PRIVATIZATION

The privatization model delegates rule-making authority to a private or quasi-governmental body. The statute may specify the institution's form and membership and may require consultation with outsiders; alternatively, it may simply delegate authority to the group and permit it to set its own internal rules and to make substantive policy with few constraints. In a pure case, consultation and oversight are limited to the group in question, and the courts have no public-law oversight role. They may, however, enforce the group's standards as law.

Many countries have a long history of using private or quasi-governmental organizations to set standards. In Germany, for example, the German Institute for Norms (DIN) operates under a government charter, and it has regulatory powers under a number of statutes.³¹ In most countries the professions regulate themselves through associations with exclusive mandates under rules that generally have legal force. For example, Polish law has created nineteen self-governing groups, mostly in the legal and health professions. Some of these groups must be consulted by the government before it issues regulations that affect the group's members.³² Here the mixture of public and private roles sometimes produces hybrids that fail both as publicly accountable bodies and as effective private associations.

Privatizing policy making raises delicate questions about the reach of the state. In some cases, a law gives official status to an existing body with a history of self-regulation. In others, a statute creates a new body, sometimes applying the template of an established group to a new regulatory area. A profession may point to a long history of self-regulation and the possession of esoteric knowledge, as with medical doctors or

31 Rose-Ackerman, *Controlling Environmental Policy*, supra note 5 at 63–5.

32 Rose-Ackerman, *From Elections to Democracy*, supra note 5 at 164, citing Maciej Kisilowski, 'The Fig Leaf: How the Concept of Representativeness Deprives Polish Decision-Making of Accountability' (Yale Law School, 2004) [unpublished].

engineers. Even so, the professional association may impose rules that put overly strict limits on entry and overly lax constraints on service quality. Professional norms may conflict with public-interest goals.

Under the corporatist or consensual variant, potentially conflicting interests negotiate to make binding regulations, with or without government input. These decisions may have an impact beyond those at the bargaining table. In the labour-management area, the Scandinavian countries provide the archetypal example where corporatist structures are strong and labour-union membership is high. Few workers and businesses lack representation, although even there the practice may fall short.³³ In other countries the national labour union/business bodies have doubtful legitimacy. For example, in Hungary and Poland labour-union membership is in decline, and the composition of the national committees is an artefact of the transition process that has not kept pace with evolving economic realities.³⁴

V *Implications and conclusions*

Accountable administrative processes are costly and time consuming. Major rule makings in the United States can take years to complete, followed by court review.³⁵ These practical difficulties, however, do not undermine the basic principle that administrative law needs to be concerned with effective democratic control of the administration. All democracies face common problems of legislative drafting, delegation, and oversight. However, a strong form of convergence is unlikely, both because states carry out different substantive policies at different scales and because of differences in their democratic constitutional structures. Identical problems can produce divergent responses, no one of which is obviously superior. This means that emerging democracies cannot simply adopt 'best practices'; they need to evaluate the options and select the institutions and legal constraints best suited to their own conditions.

Policy-making accountability is central to the democratic legitimacy of emerging modern states, and administrative law is one route to such accountability. To achieve that goal, the contrasting models mix public accountability and expertise in different ways. All of them are

33 Michael J. Gorges, *Euro-Corporatism? Interest Intermediation in the European Community* (Lanham, MD: University Press of America, 1996); Leif Lewin, 'The Rise and Decline of Corporatism: The Case of Sweden' (1994) 26 *Eur.J.Pol.Res.* 59.

34 Rose-Ackerman, *From Elections to Democracy*, supra note 5 at 131–7 [Rose-Ackerman].

35 Cary Coglianese, 'Assessing Consensus: The Promise and Performance of Negotiated Rulemaking,' 46 *Duke Law Journal* 1255 at 1283–4, 1316. See also Rose-Ackerman, supra note 34.

encountered in various forms and combinations in established democracies. Even so, there are important gaps and inconsistencies in existing law and practice. The pursuit of policy-making accountability in both established and emerging democracies faces predictable challenges that depend on constitutional and administrative design.

As an empirical matter, one ought to expect cross-country differences that result from differences in constitutional structures and the incentives they create for politicians. Those interested in strengthening democracy should not be content with the patterns of delegation, consultation, and oversight that arise from the self-interested behaviour of politicians in either parliamentary or presidential systems. The executive has wide-ranging policy discretion in all democracies, and in some, private bodies exercise public functions. Modern states need to expand participation rights beyond a predetermined group of stakeholders and to make these rights – including rights to know about regulatory initiatives, rights to present data and opinions, and rights to a public, reasoned decision both from public agencies and from quasi-private bodies with regulatory functions – legally enforceable in court. These rights will not arise spontaneously; they need strong advocates in civil society. Reforms in the emerging economies that have been the focus of much of Michael Trebilcock's work need to self-consciously consider how to achieve democratic legitimacy not just in electoral systems but also in the administration.